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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-836

UNITED STATES OF AMERICA, PETITIONER

v.

SMITH JOHN AND HARRY SMITH JOHN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–33A) is reported at 560 F. 2d 1202. The district court did not write a formal opinion. Its order denying a Motion in Arrest of Judgment, from which the appeal was taken, is reflected in the Agreed Statement of Facts (Pet. App. C, pp. 37A–38A) entered pursuant to Rule 10(d), Fed. R. App. P. The issues on which this case was decided were raised *sua sponte* by the court of appeals and briefed at that court's request (Pet. App. D, p. 39A).

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 34A) was entered on October 11, 1977. On October 29, 1977, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including December 10, 1977. The petition was filed on that date and was granted on January 16, 1978 (A. 13A). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal district courts have criminal jurisdiction over offenses committed by Indians on land purchased and held in trust by the United States for the Mississippi Band of Choctaw Indians and declared an Indian reservation by the Secretary of the Interior.

2. Whether Congress has the power to reassert federal jurisdiction over a community of Indians after they have become subject to state jurisdiction and control.

3. Whether federal criminal jurisdiction over offenses committed by Indians on land purchased and held in trust by the United States for the Mississippi Choctaws is exclusive of state criminal jurisdiction.[1]

STATUTES INVOLVED

Sections 1151 and 1153 of Title 18, United States Code, 62 Stat. 757, 758, 63 Stat. 94; Sections 5, 7, 16

[1] This question is presented in the consolidated case, *John* v. *Mississippi*, No. 77-575.

and 19 of the Indian Reorganization Act of 1934 (the Wheeler-Howard Act), 48 Stat. 984–988, 25 U.S.C. 465, 467, 476, 479; Section 9 of the Act of May 25, 1918, 40 Stat. 573; and the Act of June 21, 1939, 53 Stat. 851, are set forth in Appendix E to the Petition at pages 40A–45A.

STATEMENT

Respondents Smith John and Harry Smith John,[2] who are Indians, were indicted in the United States District Court for the Southern District of Mississippi for assaulting Artis Jenkins with intent to kill, in violation of 18 U.S.C. 1153 and 113(a) (Pet. App. C, pp. 35A–36A).[3] The indictment stated that the incident took place "on and within the Choctaw Indian Reservation and on land within the Indian country under the jurisdiction of the United States of America" (*id.* at 36A).

At trial, the government requested instructions on assault with intent to kill and also on assault with a dangerous weapon with intent to do bodily harm, without just cause or excuse. Respondents requested an additional instruction on the lesser-included offense of simple assault as defined by 18 U.S.C. 113(e). The court gave the requested instructions and the jury convicted respondents on the charge of simple

[2] Respondent Harry Smith John died on February 18, 1978, and there is no continuing controversy with regard to his conviction.

[3] The appeal was taken on an agreed statement of facts. The statement (Pet.App. C) does not disclose whether the victim was an Indian or a non-Indian. See note 6, *infra*, p. 4.

assault, acquitting them of the other offenses.[4] Respondents were each sentenced to 90 days' imprisonment and a $300 fine.[5]

Respondents then filed a timely Motion in Arrest of Judgment, under Rule 34, Fed. R. Crim. P., asserting that the district court lacked jurisdiction over lesser-included offenses of those enumerated in 18 U.S.C. 1153.[6] The district court denied the motion and

[4] After the federal prosecution and conviction, respondents were tried and convicted in the Circuit Court of Leake County, Mississippi, for aggravated assault, in violation of Miss. Code Ann. 97-3-7 (2) (Supp. 1976), on the basis of the same incident. The Supreme Court of Mississippi affirmed their convictions on the ground that federal jurisdiction over the offense was lacking, for reasons similar to those set forth in the federal court of appeals' opinion. *John* v. *State of Mississippi*, 347 So. 2d 959 (Miss. Sup. Ct.). Respondents' appeal, No. 77-575, was consolidated with this case by the Court's order of January 16, 1978 (A. 4A, 13A). The question of jurisdiction in No. 77-575 was postponed to the hearing on the merits.

[5] These sentences were served and the fines discharged before their appeal was heard. The court of appeals determined that, under *Sibron* v. *New York*, 392 U.S. 40, 50-58, these facts did not moot the case (Pet. App. A, p. 2A). Respondents apparently have also served eight months and eleven days of the two-year sentences resulting from the State conviction, after which they were released on bond pending appeal (J.S. App., p. 3A, n. 1). ("J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 77-575.)

[6] The Major Crimes Act, 18 U.S.C. 1153, does not expressly provide for jurisdiction over lesser-included offenses. However, this Court has held that Indians prosecuted under Section 1153 are entitled to a lesser-included offense instruction. *Keeble* v. *United States*, 412 U.S. 205. If the victim was a non-Indian, jurisdiction over simple assault presumably would have been conferred directly under 18 U.S.C. 1152 (the Inter-Racial Crimes Act) and 113(e). But see H.R. Rep. No. 94-1038, 94th Cong., 2d Sess. 3 (1976); *Henry* v. *United States*, 432 F. 2d 114 (C.A. 9), modified, 434 F. 2d 1283 (C.A. 9), certiorari denied, 400 U.S. 1011.

respondents appealed. On appeal, the court of appeals, *sua sponte,* asked the Department of Justice to brief the issue whether the district court had jurisdiction "to try this case at all" under 18 U.S.C. 1153 (Pet. App. D, p. 39A),[7] asking in particular whether the alleged offenses occurred within "Indian country," as Section 1153 requires.[8] Both the United States and respondents filed briefs arguing that the district court had jurisdiction.

The court of appeals disagreed. Although noting that Congress had purchased lands in trust for the Mississippi Choctaws and that the Department of the Interior, acting pursuant to the Indian Reorganization Act, had proclaimed those trust lands "an Indian reservation" for the benefit of the Mississippi Band of Choctaw Indians (Pet. App. A., pp. 8A-20A), the court of appeals held those actions insufficient to reestablish federal jurisdiction over lands ceded by the Choctaws in the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333. Reviewing the pertinent congressional actions, the court of appeals concluded

The jurisdictional issue on which the court of appeals decided the case, whether the offense occurred within Indian country, exists equally under 18 U.S.C. 1152 and 1153.

[7] The court of appeals' letter carries the same date as the denial by that court of the United States' petition for rehearing in *United States* v. *State Tax Commission of the State of Mississippi*, 505 F. 2d 633, rehearing denied, 535 F. 2d 300, rehearing en banc denied, 541 F. 2d 469 (C.A. 5).

[8] "Indian country," for the purposes of 18 U.S.C. 1153 (and 1152), is defined by 18 U.S.C. 1151 (Pet. App. E, p. 40A).

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that "the specific provisions of the Treaty of Dancing Rabbit Creek with reference to the Mississippi Choctaws were not amended, modified or abrogated by the within described Acts of Congress, 1918–1939," and that "while the citizens of the State of Mississippi of Choctaw Indian blood are, anthropologically, Indians they are nevertheless subject to the inherent police powers of the State anywhere within its exterior boundaries" (Pet. App. A, p. 19A). With regard to the proclamation by the Department of the Interior, the court stated that "[q]uite obviously, Congress in 1934 was legislating [the Indian Reorganization Act] for Indians in the government-guardian-ward relationship, and not for long emancipated individuals outside that relationship," and that Congress thus had "provided no authority for the Proclamation of the Assistant Secretary in 1944" (Pet. App. A, p. 20A).[9]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether the federal courts have jurisdiction over criminal offenses com-

[9] The court therefore did not consider whether Congress had the power to reestablish federal jurisdiction over Indians with respect to whom the guardian-ward relationship had once been terminated (Pet. App. A, pp. 13A–14A). Nor did the court of appeals decide whether the district court otherwise would have jurisdiction over lesser-included offenses of those enumerated in 18 U.S.C. 1153. Should this Court agree with our submission that the Mississippi Choctaw lands are Indian country within the meaning of 18 U.S.C. 1151, the Court should remand the case to the court of appeals to consider the latter issue. On remand, it may be advisable to supplement the record to show whether the victim was an Indian or non-Indian. See note 3, *supra*, p. 3

mitted on land purchased and held in trust by the United States for the Mississippi Band of Choctaw Indians. We submit that such jurisdiction is established by the relevant jurisdictional statutes, the prior decisions of this Court, and almost two centuries of Choctaw history.

1. The indictment in the present case charged respondents with assault with intent to commit murder in violation of 18 U.S.C. 1153 (the Major Crimes Act). The Major Crimes Act brings within federal jurisdiction certain enumerated crimes committed by Indians "within the Indian country," as defined by 18 U.S.C. 1151. According to that section, "Indian country" means, among other things, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government * * *," and "all dependent Indian communities within the borders of the United States whether within the original or subsequent acquired territory thereof, and whether within or without the limits of a State."

Thus, to determine whether the federal court had jurisdiction over respondents' offenses, we must determine whether the land on which the offenses occurred was "Indian country" as defined in Section 1151. For this purpose we must look in turn to the nature of the Mississippi Choctaws and of the Choctaw lands.

The history of the Choctaws in Mississippi is long and at times painful. For present purposes, it begins in the early nineteenth century when the Choctaws,

one of the Five Civilized Tribes, entered into treaties with the United States by which they ceded their lands in Mississippi to the federal government and received new lands in Oklahoma. Treaty of Exchange of Territory, 7 Stat. 210; Treaty of Dancing Rabbit Creek, 7 Stat. 333. Rather than move west, certain Choctaws chose to remain in their ancestral territory. There, they "adopted the dress, habits, customs, and manner of living of the white citizens of the State. * * * They did not live upon any reservation, nor did the [federal] Government exercise supervision or control over them" (*Winton* v. *Amos,* 255 U.S. 373, 378). Gradually, their number was depleted and their condition worsened.

By the end of the nineteenth century, the plight of the Mississippi Choctaws was decidedly unhappy. "At this time the full-blood Mississippi Choctaws were extremely poor, living in [un]sanitary conditions and working at manual labor for daily wages. Their children were not permitted to attend schools provided for the whites, and they were denied all social and political privileges. As already appears, they were receiving neither care nor attention from the Indian Office or the Department of the Interior * * *" (*Winton* v. *Amos, supra,* 255 U.S. at 379–380). Regarded by federal authorities as citizens of Mississippi, yet cut off by the State from "all social and political privileges," the Mississippi Choctaws suffered the worst of both worlds.

In 1918 the United States finally took action to bring relief to the Mississippi Choctaws. By the Act of May

25, 1918, Section 9, 40 Stat. 561, 573, Congress appropriated funds for medical assistance, schools, farm animals and equipment, and, most important, "lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians * * *." In later Acts Congress appropriated additional funds for land purchases until some 19,000 acres were acquired. *E.g.,* 41 Stat. 15 (1919); 43 Stat. 409 (1924); 44 Stat. 941 (1927); 46 Stat. 1121 (1931). At the same time Congress extended to the Mississippi Choctaws other federal benefits, which have continued to the present time.

Such legislation did not complete the United States' dealings with the Mississippi Choctaws. Pursuant to the Indian Reorganization Act of 1934, the Mississippi Band adopted a constitution and by-laws, which the Department of the Interior approved in May 1945. Congress also provided in 1939 that title to lands purchased for the Mississippi Choctaws under the 1918 Act and later Acts would be held by the United States in trust for their benefit. In December 1944, the Secretary of the Interior proclaimed these lands and lands acquired under the Indian Reorganization Act to be a reservation (Pet. App. A, pp. 23A–25A).

The lands on which respondents' acts occurred undisputedly were among the lands purchased by the United States, held in trust for the Mississippi Choctaws, and proclaimed as part of the Choctaw reservation by the Secretary of the Interior. Thus, the federal courts acquired jurisdiction over those offenses pursuant to 18 U.S.C. 1153 both because the lands were "within the limits of [an] Indian res-

ervation under the jurisdiction of the United States Government" and because the Mississippi Choctaws are a "dependent Indian communit[y] within the borders of the United States."

Although the court of appeals (without discussing the jurisdictional statutes) found no congressional intent to extend federal protection to the Mississippi Choctaws, that conclusion is belied by the course of dealing between Congress and the Mississippi Choctaws over the past sixty years. This Court has recognized in other cases that similar actions by Congress established Indian country subject to federal jurisdiction. See, *e.g., United States* v. *McGowan,* 302 U.S. 535; *United States* v. *Sandoval,* 231 U.S. 28.

The contrary conclusion would mean that federal efforts to restore the vitality of the Choctaw Tribe, and to recognize its continuing existence as a tribal entity, could be nullified by state authorities reluctant to surrender any element of state jurisdiction. The State would then be able to exercise pre-emptive authority over many aspects of tribal self-determination, depriving the federal government of its usual plenary authority to supervise and protect Indian affairs. It is not plausible that Congress, when it set out to help the Mississippi Choctaws, intended to act in so limited and ineffective a manner.

2. Congress has power to reassert federal dominion over Indians previously released from the guardian-ward relationship. The power derives from the In-

dian Commerce Clause, Article I, Section 8, clause 3, and the Treaty Making Clause, Article II, Section 2, clause 2, of the Constitution, viewed in the light of the United States' unique responsibility for the Indian people within its borders. See, *e.g., Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U.S. 375; *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164. "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders * * *." *United States* v. *Sandoval,* 231 U.S. 28, 45–46. This plenary power is not lost forever because Congress at one time contemplated by treaty that certain Indians could become assimilated into non-Indian society. To the contrary, Congress retains the power to alter treaty terms by subsequent legislation when it deems such alteration necessary and appropriate. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553.

Moreover, Congress has the power under the Property Clause, Article IV, Section 3, clause 2, to "* * * make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Where "[t]he Government retains title to the lands which it permits the Indians to occupy [,]

[t]he Government has authority to enact regulations and protective laws respecting this territory." *United States* v. *McGowan*, 302 U.S. 535, 539. In 18 U.S.C. 1152–1153 Congress has enacted such protective laws for reservation Indians and dependent Indian communities (see 18 U.S.C. 1151). Unlike Congress' derivative legislative powers (see Article I, Section 8, clause 17), the consent of a state is not a prerequisite to the exercise of powers under the Property Clause. *Kleppe* v. *New Mexico*, 426 U.S. 529, 541–546.

We conclude, therefore, that Congress has the power to bring the Mississippi Choctaws within the scope of federal protection and that, through the Indian Reorganization Act and its other dealings with the Choctaws since 1918, Congress has done so.

3. Whether such federal jurisdiction pre-empts state criminal jurisdiction is the additional issue presented in *John* v. *Mississippi*, No. 77–575. The United States submits that the assertion of federal criminal jurisdiction over Mississippi Choctaw lands does preempt State jurisdiction over crimes involving Indians.

It is well-established that federal criminal jurisdiction within Indian country is generally exclusive of state jurisdiction. See *Williams* v. *United States*, 327 U.S. 711; *United States* v. *Chavez*, 290 U.S. 357. Although States have criminal jurisdiction over crimes involving only non-Indians, *United States* v. *McBratney*, 104 U.S. 621, "if the crime [is] by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive."[10] *Williams* v. *Lee*, 358 U.S. 217, 220. See also *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164. Neither the case law nor the relevant federal statutes, 18 U.S.C. 1151–1153, suggest any exception to this general rule for Indian country that was previously subject to state jurisdiction.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789. In determining whether States may exercise jurisdiction over Indian affairs, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, *supra*, 358 U.S. at 220. Few types of state action would infringe on the self-government and tribal existence of the Mississippi Choctaws more directly than the exercise of state criminal jurisdiction over tribal members. The federal government, both before and after passage of the Indian Reorganization Act, has taken substantial action to reestablish the Mississippi Choctaws within their ancestral territory and restore the tribe as a self-governing entity. Those efforts would be undermined if the State was allowed to subject the Choctaws to the full force of its criminal and civil laws.

[10] This Court has recently held that tribal courts lack jurisdiction where the offense is committed by a non-Indian against an Indian. *Oliphant* v. *The Suquamish Indian Tribe*, No. 76–5729, decided March 6, 1978.

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ARGUMENT

I. THE LANDS HELD BY THE UNITED STATES IN TRUST FOR THE MISSISSIPPI BAND OF CHOCTAW INDIANS AND DECLARED A RESERVATION BY THE SECRETARY OF THE INTERIOR ARE INDIAN COUNTRY WITHIN THE MEANING OF 18 U.S.C. 1151

At issue in this case is whether lands purchased and held in trust by the United States for the Mississippi Band of Choctaw Indians constitute "Indian country" within the meaning of 18 U.S.C. 1151. In concluding that they do not, the court of appeals gave too little attention to the governing jurisdictional statutes and the course of dealing between the United States and the Mississippi Choctaws over the past sixty years.

A. THE DEFINITION OF INDIAN COUNTRY

In determining the extent of federal criminal jurisdiction, one starts with the jurisdictional statutes. The indictment in this case charged that respondents, members of the Mississippi Choctaws, had committed an assault with intent to kill "on and within the Choctaw Indian Reservation and on land within the Indian country under the jurisdiction of the United States, in violation of 18 U.S.C. 1153" (the Major Crimes Act). Section 1153 confers jurisdiction on the federal district courts over certain enumerated crimes committed by Indians "within the Indian country."

The definition of Indian country is found in 18 U.S.C. 1151, the "Indian country statute." Enacted

in 1948 as a codification of existing case law,[11] Section 1151 designates three categories of land as Indian country:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

As the language and the history of this statute make clear, "Indian country" today is not limited to "original" Indian lands: lands to which Indian title has never been extinguished, or to which Indians have always claimed an aboriginal title or right of possession. While original Indian title was once a necessity under prevailing statutes (Act of June 30, 1834, 4 Stat, 729) [12] and case law (*Bates* v. *Clark*,

[11] See Reviser's Note, 18 U.S.C. 1151.

[12] Section 1 of this Act defined (4 Stat. 729) the Indian country as follows: "* * * all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished * * *."

95 U.S. 204), later cases dispensed with that requirement. Thus, in *Donnelly* v. *United States,* 228 U.S. 243, this Court held that federal jurisdiction extended to an Indian reservation created out of public lands by an Executive Order, stating that "Indian country" could no longer be confined to land to which Indian title remains unextinguished. Noting the earlier statutes and cases, the Court observed (228 U.S. at 269):

> * * * "the changes which have taken place in our situation, are so numerous and so material, that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed 'Indian country,'" within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country, than a tract of land, that, being a part of the public domain, is lawfully set apart as an Indian reservation.

The Court reaffirmed that view shortly thereafter in *United States* v. *Pelican,* 232 U.S. 442, which likewise involved a reservation created from the public domain, rather than from land previously in Indian possession. In *Pelican* the Court declared that, despite the lack of original Indian title, the land was Indian country because it had been validly set apart for the use of the Indians as such, under the superintendence of the government (232 U.S. at 449). That view is now codified in the plain language of Section 1151,

which mentions no requirement of original title.[13] Thus, if the federal government can create a reservation by Executive Order from lands within the public domain (and hence within the legislative jurisdiction of the state), as in *Donnelly* and *Pelican*, it may do so (as in this case) from purchased lands that lie within the legislative jurisdiction of the State.

Nor is the existence of a reservation a *sine qua non* of federal jurisdiction. This Court has recognized that Indian country is not limited to lands within a formally-declared reservation. In *United States* v. *McGowan,* 302 U.S. 535, the Court held that the Reno Indian Colony, "composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress in 1917 and 1926" (*id.* at 537; footnotes omitted), was "Indian country" even though the Indians involved were not a tribe but needy Indians scattered over the State of Nevada. The Court noted (*id.* at 538–539, emphasis by the Court; footnote omitted):

> Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a

[13] The Reviser's notes reveal that 18 U.S.C. Sec. 1151(a) is a codification of the term's construction by this Court in *Donnelly* and other cases. For a general discussion of the development and purpose of the definition codified in Section 1151, see Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 507–510 (1976).

settlement as a "reservation" or "colony." In the case of *United States* v. *Pelican,* 232 U.S. 442, 449, this Court said:

> "In the present case the original reservation was Indian country simply because *it had been validly set apart for the use of the Indians as such, under the superintendence of the Government.*"

That view was incorporated by the Reviser in Section 1151(b).

Since the lands at issue in this case are not "Indian allotments" (Section 1151(c)), the question is whether they are "within the limits of any Indian reservation under the jurisdiction of the United States" (Section 1151(a)), or whether the Mississippi Choctaws are a "dependent Indian communit[y]" (Section 1151(b)). For the answer we must turn to the somewhat unusual history of the Mississippi Choctaws and their relationship with the federal government, which demonstrates that both these tests are met.

B. THE MISSISSIPPI CHOCTAWS

The history of the Choctaw Tribe antedates the history of our nation. At the time of the European discovery, the Choctaws farmed a domain that covered most of the present State of Mississippi and adjoining parts of what is now Louisiana and Alabama. One of the Five Civilized Tribes, the Choctaws lived in peaceful co-existence with their non-Indian neighbors and were never reduced to a conquered status by the United States. As the non-Indian desire for land

grew, however, the Choctaws, like many other Indian tribes, were subjected to increasing pressure to leave their ancestral homelands and relocate in the westward territories.

In the early nineteenth century the Choctaw Tribe signed several treaties with the United States in which they ceded their lands in Mississippi to the federal government in exchange for specified payments and new lands in what is now Oklahoma. This process culminated in 1830 with the Treaty of Dancing Rabbit Creek, 7 Stat. 333, in which the Tribe ceded the last 10,500,000 acres of its Mississippi domain (see Pet. App. A, p. 9A). Certain members of the Tribe chose to remain in Mississippi, however, rather than leave their ancestral territory. Article 14 of the Treaty permitted them to do this and provided that those tribal members who remained in Mississippi would receive parcels of land for themselves and their families and would become citizens of the State, though they "shall not lose the privilege of a Choctaw citizen" (Pet. App. A, pp. 9A–10A and n. 4).

The unhappy story of these remaining Mississippi Choctaws is chronicled in *Winton* v. *Amos,* 255 U.S. 373. Left by themselves after the westward migration, they gradually "adopted the dress, habits, customs, and manner of living of the white citizens of the State * * *" (*id.* at 378). They did not, however, accede to the rights of state citizens as the Treaty promised, or to the benefits available to non-Indian settlers. "Their children were not permitted to at-

tend schools provided for the whites, and they were denied all social and political privileges" (*id.* at 379–380). Under the circumstances, the contemplated assimilation of the Mississippi Choctaws into non-Indian society was impossible.

At the same time, and as a consequence of the assimilationist ideal, the Mississippi Choctaws, unlike many other destitute Indians, were removed from the guardianship and protection of the federal government. "They did not live upon any reservation, nor did the Government exercise supervision or control over them" (*id.* at 378); "they were receiving neither care nor attention from the Indian Office or the Department of the Interior" (*id.* at 379–380).

In addition, representatives of the federal government denied many of these Indians the land that Article 14 of the Treaty had promised. As recounted in a 1935 Court of Claims decision,

> * * * the large number of Indians who remained in the State were subjected to a series of maladministration[s] of the article by accredited representatives of the United States that in and of itself discloses an inexcusable, cruel, and unjust procedure never excelled, if equaled, in the history of Indian affairs. Not to exceed 143 heads of families, embracing 276 individual Indians, ever received an allotment under article XIV, and at least 1,155 heads of families embracing at least 3,800 individual Indians were by intimidation, false entries, and destroyed documents cheated out of and denied their rights.

Choctaw Nation v. *United States*, 81 Ct. Cl. 1, 15–16, certiorari denied, 296 U.S. 643. Moreover, much of the land that was received by Mississippi Choctaws pursuant to the Treaty, because it was not held in trust by the United States or impressed with conditions on alienation, passed out of Indian hands.

In 1918 the federal government finally began to help the Mississippi Choctaws. By the Act of May 25, 1918, 40 Stat. 561, 573, Congress appropriated funds for medical assistance, schools, and other improvements. More important, Congress provided for the purchase of lands, "including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians." The Act made additional appropriations for needed farm animals and equipment. By succeeding Acts in every year through 1931, Congress purchased more lands for the Choctaws and extended to them additional federal benefits. See, *e.g.*, 41 Stat. 15 (1919); 43 Stat. 409 (1924); 44 Stat. 941 (1927); 46 Stat. 1121 (1931).[14]

The revitalized relations between the federal government and the Mississippi Choctaws were strengthened further after passage of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461 *et seq.* Section 18 of that Act (25 U.S.C. 478) provided that the Act would not apply "to any reservation wherein

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[14] As the court of appeals noted (Pet. App. A, pp. 5A–6A), the purchased lands were not fully contiguous and were distributed through six counties. They were, however, located at seven villages where the Choctaws were concentrated and these comprise the reservation proclaimed by the Secretary of the Interior in 1944.

a majority of the adult Indians" voted against it, and required the Secretary of the Interior to call such elections. Pursuant to this provision, on March 30, 1935, the Secretary submitted the Act to the Mississippi Choctaws, and they voted to accept it (see Pet. App. A, pp. 23a–24a). In 1939, pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, the United States acquired more than 11,000 additional acres in Mississippi in trust for the use and benefit of the Choctaw Indians of one-half or more Indian blood. Act of June 21, 1939, 53 Stat. 851.

By that same 1939 enactment, because the Choctaws had generally been unable to repay the federal government for the acquired lands (H.R. Rep. No. 194, 76th Cong., 1st Sess. (1939)). Congress also provided that title to land purchased under the appropriations of 1918–1931 would be held in trust by the United States for the Mississippi Choctaws.

The Choctaw lands were brought more completely within federal protection in December 1944. At that time the Assistant Secretary of the Interior, noting that the Mississippi Choctaws had voted in 1935 to accept the provisions of the Indian Reorganization Act and that lands had been acquired both before and after that date for the Choctaws' benefit, declared that the earlier-purchased lands were now held by the United States in trust for the Choctaws and further declared (Pet. App. A, pp. 24A–25A):

> [T]hat the approximately 11,600 acres of additional land in Mississippi, acquired since June 18, 1934, for the benefit of the Choctaw Indians of that State are hereby added to the land previously acquired and *such lands are hereby declared to be an Indian reservation* for the benefit of those members of the Mississippi Band of Choctaw Indians, of one-half or more Indian blood, resident in Mississippi and enrolled at the Choctaw Indian Agency * * * [Emphasis added.]

The Mississippi Choctaws subsequently adopted a constitution and by-laws pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, and these were approved by the Secretary of the Interior on May 22, 1945.

As the court of appeals recognized (Pet. App. A, p. 21A), the dependency of the Mississippi Choctaws on the federal government continues to the present time. Congress annually appropriates funds that are administered by the United States for the Mississippi Choctaws in the same manner as for other Indian tribes. These statutes contain no indication that Congress intends the Mississippi Choctaws to enjoy a less favorable relationship with the federal government than their parent tribe or other tribes, or that the federal concern for their welfare was irretrievably curtailed by the cession treaties of the early nineteenth century.

C. THE MISSISSIPPI CHOCTAWS AS A "DEPENDENT INDIAN COMMUNITY"

The history of the Mississippi Choctaws establishes that they are a "dependent Indian communit[y]" within the meaning of 18 U.S.C. 1151(b). By purchasing land for their benefit, extending federal aid, and pursuing other actions since 1918, the federal gov-

ernment has taken decisive steps to bring these Indians back under federal protection. These measures demonstrate an intent to reestablish the guardian-ward relationship between the United States and the tribe.

The Court stated in *United States* v. *McGowan, supra,* 302 U.S. at 538, with regard to a similar Indian community: "[t]he fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people." The same "fundamental consideration" is present here. That being so, there is no legal significance in the fact that the Mississippi Choctaws had an intervening period of independence, which regrettably served only to demonstrate their need for continued protection by the United States.[13]

[13] Although the Fifth Circuit in this case also concluded that Congress in enacting the Indian country statute (18 U.S.C. 1151) could not have intended federal jurisdiction to apply to Indian trust lands interspersed with non-Indian land in "checkerboard" fashion (Pet. App. A, pp. 7A–8A), the Tenth Circuit has correctly rejected such reasoning in *United States* v. *Martine*, 442 F. 2d 1022, 1023–1024. In *Martine*, federal authorities, alleging jurisdiction under 18 U.S.C. 1153, prosecuted a Navajo Indian for an incident occurring on "the so-called checkerboard area of western New Mexico" (442 F. 2d at 1023). Describing this area as "a patchwork of land, some of which is owned by the Navajo Tribe, some of which is not, [and which] does not lie within the boundaries of any Indian Reservation (*ibid.*), the court upheld federal jurisdiction over the land (which had been "purchased with tribal funds from a corporate owner" (*ibid.*)) on the ground that its inhabitants constituted a "dependent Indian communit[y]" under 18 U.S.C. 1151(b).

Following the analysis of this Court in *United States* v. *Sandoval, supra*, which required examination of "the manner in which the pueblos had been treated by legislative and executive agencies" (442 F. 2d at 1023), the court concluded that federal actions with regard to the Navajos occupying the land in question were sufficient to make them a "dependent Indian community" and hence to confer federal jurisdiction over the Navajo portion of the checkerboard. Similar considerations are relevant here. Moreover, some Acts of Congress plainly result in checkerboard jurisdiction, and the Court has given them full effect. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584; *DeCoteau* v. *District County Court*, 420 U.S. 425.

D. THE MISSISSIPPI CHOCTAW LANDS AS AN "INDIAN RESERVATION"

We also submit that the Mississippi Choctaw lands, at least since 1944, have constituted an "Indian reservation" within the meaning of 18 U.S.C. 1151(a). At that time, the Secretary of the Interior, acting pursuant to the Act of June 21, 1939, 53 Stat. 851, and Section 7 of the Indian Reorganization Act, 25 U.S.C. 467, expressly declared that the lands purchased and held in trust for the Mississippi Choctaws were "an Indian reservation." Unless the Secretary lacked the power to do so, such federal action established a reservation for the Choctaws and brought them within the scope of federal jurisdiction.

The court of appeals did conclude that the Secretary lacked power to establish a reservation for the Mississippi Choctaws (Pet. App. A, pp. 19A–20A). The court reasoned that the overriding purpose of the Indian Reorganization Act was to benefit "federally recognized Indian tribes" and to legislate for "Indians in the government-guardian-ward relationship," not for "long emancipated individuals outside that relationship" (Pet. App. A, pp. 19A–20A).

As indicated above, we believe that the federal gov-

ernment's actions since 1918 had reestablished a guardian-ward relationship with the Mississippi Choctaws by 1934. But the court's restricted reading is in any event inconsistent with the language and purpose of the Act, which is to be liberally construed for the Indians' benefit. *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n. 7; *Bryan* v. *Itasca County*, 426 U.S. 373, 392. See, also, *Antoine* v. *Washington*, 420 U.S. 194, 199–200. While Congress naturally emphasized increased self-government for existing tribes, there is no basis for concluding that additional tribes or reservations could not be recognized under the Act.

The provisions of the Indian Reorganization Act show an intent by the Congress to exercise its full power over Indian affairs, including its power over individual non-tribal Indians and remnants of established tribes (see p. 33, *infra*). Section 7 of the Act, 25 U.S.C. 467,[16] provides that "new Indian reservations" may be proclaimed on land acquired pursuant to, among other provisions, Section 5 of the Act (25 U.S.C. 465). Section 5, the primary authority for the purchase of lands since 1934 for the Mississippi Choctaws (see Pet. App. A, p. 24A), authorizes

[16] 25 U.S.C. 467 provides: "The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by sections 461, 462, 463, 464, 465, 466–470, 471–473, 474, 475, 476–478, and 479 of this title, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations."

the acquisition of land "for the purpose of providing land for Indians" and further declares that title to any lands acquired "shall be taken in the name of the United States in trust for the Indian tribe *or individual Indian* for which the land is acquired" (emphasis added). The term "Indian" is then defined by Section 19, 25 U.S.C. 479, to include, among others, "all other persons of one-half or more Indian blood."

By its terms, therefore, the Act is not limited to members of federally-recognized tribes but applies to certain non-tribal Indians as well. See also 78 Cong. Rec. 11732 (1934). The Court of Appeals for the District of Columbia Circuit, in *Maynor* v. *Morton*, 510 F. 2d 1254, has recognized that the Act, "[a]lthough * * * primarily designed for tribal Indians" (*id.* at 1256), applies to certain non-tribal Indians and that it authorizes the Secretary to establish new reservations for them. The court stated (*ibid.*):

> [I]t is clear from the language of the statute that some benefits of the Act were also open to any nonreservation Indian who could prove that he possessed at least one-half Indian blood. Among these benefits was the right to petition the Secretary to establish a reservation for such individuals, which, if granted, would afford them access to a wide range of federal Indian services (as a member of a recognized Indian group on a reservation). [Footnote omitted.]

The reasoning of the court of appeals in this case also conflicts with a contemporaneous interpretation

of the Indian Reorganization Act by the then Assistant Solicitor of the Department of the Interior, Felix Cohen, who was instrumental in drafting the Act.[17] Memorandum Opinion of the Assistant Solictior, U.S. Department of the Interior, April 8, 1935 (Pet. App. F). Discussing the establishment of reservations for many Eastern groups of Indians, such as the Mississippi Choctaws, the Assistant Solicitor stated:

> * * * These Indians, therefore, like many other Eastern groups, can participate in the benefits of the Wheeler-Howard Act only in so far as individual members may be of one-half or more Indian blood. Such members may * * * also organize under sections 16 and 17 of the Wheeler-Howard Act if the Secretary of the Interior sees fit to establish for these eligible Indians a *reservation*. Such a reservation might be established * * * through the outright purchase of land by the Secretary of the Interior, under Section 5 of the Wheeler-Howard Act, * * *. [Pet. App. F, pp. 46A–47A; emphasis in original.]

Furthermore, the Mississippi Choctaws were listed as one of the tribes that the Bureau of Indian Affairs surveyed during the consideration by Congress of the Indian Reorganization Act; along with 50 other tribes, they voted in favor of the bill, and this was reported to Congress. Hearings of Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 102–105 (1934). Also,

[17] Felix Cohen was one of the authors of the Act and a noted authority on Indian affairs. See *Squire* v. *Capoeman*, 351 U.S. 1, 9 n. 15; *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 159 (dissenting opinion).

as noted earlier (p. 22, *supra*), after the Act was passed the Secretary of the Interior submitted it to a vote of the Mississippi Choctaws pursuant to Section 18 of the Act.[18]

There is other evidence that Congress contemplated application of the Indian Reorganization Act for the benefit of the Mississippi Band of Choctaw Indians. The House Report recommending passage of the Act of June 21, 1939, 53 Stat. 851, which provided that title to purchased lands would be held by the United States in trust for the Mississippi Choctaw Indians, noted that passage of the Act

> will avoid many administrative problems which will arise otherwise; will insure a more productive use of the lands; and will facilitate matters greatly if the Indians should choose to organize under Section 16 of the Indian Reorganization Act, and take over administration of their lands. [H.R. Rep. No. 194, 76th Cong., 1st Sess. 3 (1939).]

Thus, Congress not only contemplated that the Indian Reorganization Act applied to the Mississippi Choctaws, but took specific action to facilitate their administration of the land involved here, pursuant to the Act.

[18] In interpreting a statute the Court "shows great deference to the interpretation given the statute by the officers or agency charged with its administration" (*Udall* v. *Tallman*, 380 U.S. 1, 16), and particularly to "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408, quoted in *Udall* v. *Tallman*, 380 U.S. 1, 16.

When the Secretary of the Interior in 1944 proclaimed the lands purchased for the Mississippi Choctaws to be an "Indian reservation," he was, therefore, acting within the scope of the Indian Reorganization Act. Assuming that Congress had the authority it exercised in that Act (a question to be discussed presently), the Secretary was establishing an "Indian reservation" for the purpose of the Indian country statute (18 U.S.C. 1151), and hence federal criminal jurisdiction under 18 U.S.C. 1153 over major crimes committed by Indians on those lands.[19]

Indeed, it makes little sense to suppose that the federal government reestablished such important ties with the Mississippi Choctaws without intending to provide them with the same federal protection against crime that was extended to most other non-assimilated Indians. Whether or not the state also has criminal jurisdiction over Indians on these lands, an issue that we address in Section III, *infra,* Congress hardly would have intended to place Choctaw lands under federal control for purposes of management and yet leave them solely within the jurisdiction of

[19] The record does not reveal respondents' relationship with the Mississippi Band, other than to show that they are Indians (Pet. App. C, p. 35A). This Court has not decided whether enrollment in an official tribe is a requirement for federal jurisdiction under 18 U.S.C. 1153. Lower courts have found such enrollment unnecessary, at least where the Indian defendant lives on the reservation and maintains tribal relations with the Indians thereon. *United States* v. *Antelope*, 430 U.S. 641, 646, 647 n. 7; see also *In re Carmen's Petition*, 165 F. Supp. 942, 946–948 (N.D. Cal.) (*dicta*), affirmed *sub nom Dickson, Warden* v. *Carmen*, 270 F. 2d 809 (C.A. 9), certiorari denied, 361 U.S. 934.

the state for other purposes. If state police protection was interrupted for some reason, or was otherwise ineffectual, Indians on these federal lands would be virtually without legal protection at the same time that they were seeking to reestablish their tribal stability. In providing relief for the Mississippi Choctaws, the federal government treated them not as other citizens of Mississippi but as special objects of federal concern, entitled to a full and necessary measure of federal protection.

We submit, therefore, that congressional and administrative actions over the past sixty years have established the lands of the Mississippi Choctaws as Indian country as defined in 18 U.S.C. 1151, both because the Mississippi Choctaws are a "dependent Indian community" and because their lands are an "Indian reservation under the jurisdiction of the United States Government." In the succeeding sections, we discuss whether the federal government had the power to take such action and whether federal jurisdiction over the Choctaw lands is exclusive of state jurisdiction.

II. CONGRESS MAY LEGISLATE FOR THE BENEFIT OF THE MISSISSIPPI CHOCTAWS UNDER ITS PLENARY POWER TO REGULATE INDIAN AFFAIRS AS WELL AS ITS POWER TO GOVERN THE USE OF FEDERAL PROPERTY

A. POWER OVER INDIAN AFFAIRS

Few propositions are more securely established than that the federal government has plenary power over Indian affairs within the United States. See

Cherokee Nation v. *Georgia,* 5 Pet. 1; *Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U.S. 375. While "[t]he source of federal authority over Indian matters has been the subject of some confusion, * * * it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 172 n. 7. "This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted." *Board of Commissioners* v. *Seber,* 318 U.S. 705, 715.

This Court has never given this power a confining or grudging construction; rather it has noted the special responsibilities that arise from the historical dealings between the Indians and the federal government. "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." *United States* v. *Kagama, supra,* 118 U.S. at 384–385. Moreover, the Court has recognized that "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be

carried out." *United States* v. *McGowan, supra,* 302 U.S. at 538.

Although the federal power over Indian affairs is exercised most commonly in connection with recognized Indian tribes, it extends to individual Indians and remnants of established tribes as well. In *McClanahan* v. *Arizona State Tax Comm'n, supra,* 411 U.S. at 179–180, this Court struck down a state income tax on individual Indians, saying: "Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." Similarly, this Court has acknowledged "[t]he obligation and the power of the United States to protect and preserve * * * restricted allotted lands for the Indian owners * * *." *Board of Commissioners* v. *Seber, supra,* 318 U.S. at 717; *Heckman* v. *United States,* 224 U.S. 413. As we have previously discussed (pp. 23–24, *supra*), the Federal Government also "exercis[es] a fostering care and protection of all dependent Indian communities within its borders" (*United States* v. *Sandoval, supra,* 231 U.S. at 46), and "it is immaterial whether Congress designates a settlement as a 'reservation' or 'colony' " (*United States* v. *McGowan, supra,* 302 U.S. at 538–539).

While Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe" (*United States* v. *Sandoval, supra,* 231 U.S. at 46), it is clear

that "in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts" (*ibid.*). The Mississippi Choctaws, a band of some 2,000–4,000 Indians, the remnants of one tribe, who live in general proximity to one another in adjoining counties within a State, are a "distinctly Indian communit[y]." As such, they are appropriate subjects for legislation by Congress in the exercise of its plenary power over Indian affairs.

The power of Congress to assert jurisdiction over the Mississippi Choctaws was not irrevocably divested in 1830 by the Treaty of Dancing Rabbit Creek. Although the Choctaws ceded lands in Mississippi to the United States, Article XIV of the Treaty (7 Stat. 333, 335) contemplated that certain full-blood Choctaws, "being desirous to remain and become * * * citizen[s] of the States," would stay in Mississippi and be entitled to grants of land. The Treaty further provided that "[p]ersons who claim under this article shall not lose the privilege of a Choctaw citizen * * *." Nothing in the Treaty provided that the federal government would not later bring the Mississippi Choctaws within the ambit of federal protection, expend funds for their care, provide tribal land for them, or reestablish a reservation for them.

Even if the Treaty had contained an express provision limiting the relationship between the federal government and the Mississippi Choctaws, that provision would not be a perpetual bar to reestablishment of federal supervision. It is well-established that Congress, having the power to enter into treaties with the Indians, has the corresponding power to modify or act inconsistently with treaty provisions when it deems it necessary to do so. *Menominee Tribe* v. *United States,* 391 U.S. 404, 412–413; *Ex parte Webb,* 225 U.S. 663, 683; *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565–566. Here, where Congress is acting for the Indians' benefit and no party to the Treaty objects to such action, it is not a proper judicial function to hold Congress to enforcement of a hard bargain or to sever Congress's authority to provide relief. If Congress, once having granted certain Indians their independence, were disabled from reestablishing the guardian-ward relationship in response to subsequent conditions, the freedom of the federal government to experiment with different proposals for the Indians' welfare would be needlessly limited.

It is similarly irrelevant to the extent of Congress's power over particular Indians that they have become citizens of a State. In *Winton* v. *Amos, supra,* this Court upheld a jurisdictional statute providing for "a suit of an equitable nature against [a] class of Mississippi Choctaws" (255 U.S. at 391), stating (*id.* at 392): "The [federal] guardianship arises from [the Indians'] condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it" (citations

omitted). That decision, upholding Congress's powers over the Mississippi Choctaws more than seventy years after the Treaty of Dancing Rabbit Creek, confirms the enduring nature of the United States' authority over its Indian peoples, regardless of any prior intention to commit them to the exclusive protection of the states. See *McClanahan* v. *Arizona State Tax Comm'n, supra; Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463.

It may be that at some point certain Indians can become so indistinguishable from their non-Indian neighbors, and their Indian origins so attenuated, that the federal government cannot rationally single them out for special treatment. See *Morton* v. *Ruiz*, 415 U.S. 199. But that possibility need not concern us here. The Mississippi Choctaws never achieved integration into non-Indian society. Indeed, no one has questioned the authority of Congress to purchase lands and provide benefits to relieve their suffering. Once that power is conceded, it seems unavoidable that Congress had the additional power to place the lands in trust status, authorize their designation as a reservation, and extend to them and the Indians living on them the protection of the federal criminal laws. That, we submit, is what Congress has done.

B. THE PROPERTY CLAUSE

Having acquired title to the Mississippi Choctaws' lands, Congress also was empowered to assert criminal jurisdiction over those lands pursuant to the Property Clause of the Constitution (Article IV, Section 3,

clause 2), which authorizes Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."

This Court has long recognized that the Property Clause gives Congress legislative power over Indians on government lands. In *United States* v. *Celestine*, 215 U.S. 278, the Court stated that "[f]rom an early time in the history of the Government [Congress] has exercised this power, and has also been legislating concerning Indians occupying such territory" (*id.* at 284), citing as an example the Act of June 30, 1834, 4 Stat. 729, defining "Indian country." Subsequently, in *United States* v. *McGowan, supra*, 302 at 539, the Court noted that "[t]he Government retains title to the lands which it permits the Indians to occupy * * * [and] has authority to enact regulations and protective laws respecting this territory," citing the Property Clause. Sections 1152 and 1153 of Title 18 are examples of "protective laws" for the Indians' benefit applicable in lands owned by the United States.

This Court has recently reaffirmed the broad scope of Congress' powers under the Property Clause. In *Kleppe* v. *New Mexico*, 426 U.S. 529, the Court declared that Congress itself has the power to determine what are necessary rules respecting the public lands, and analogized this power to the police power of the States.[20]

[20] "[T]he Clause, in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands.

Nor is state consent a prerequisite to the exercise of Congress's power under the Property Clause or its power over Indian affairs. Although Congress may acquire derivative legislative power from a state pursuant to Article I, Section 8, clause 17 of the Constitution (the Arsenals and Dockyards Clause), see *Paul* v. *United States*, 371 U.S. 245, the powers asserted here are not derived from that clause but are independent and unrelated. As this Court stated in *Kleppe* v. *New Mexico, supra*, with regard to the Property Clause (426 U.S. at 543): "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause * * *. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause" (citations omitted).

These principles apply fully to the exercise of Congress' powers over lands held for the Indians' benefit; otherwise, essential federal programs might well be put "completely at the mercy of state legislation"

United States v. *San Francisco*, 310 U.S. at 29–30; *Light* v. *United States*, 220 U.S. at 537; *United States* v. *Gratiot*, 14 Pet. at 537–538. And while the furthest reaches of the power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that '[t]he power over the public lands thus entrusted to Congress is without limitations.' * * * And even over public land within the States, '[t]he general Government doubtless has a power over its own property analogous to the police power of the several States and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case" (426 U.S. at 539).

(*Kleppe* v. *New Mexico, supra*, 426 U.S. at 543). Accordingly, Congress had the power to declare the Mississippi Choctaw lands "Indian country" and assert federal criminal jurisdiction over them.

III. FEDERAL CRIMINAL JURISDICTION ON MISSISSIPPI CHOCTAW LANDS IS EXCLUSIVE OF STATE JURISDICTION OVER CRIMES INVOLVING INDIANS

For the reasons previously stated, we submit that the federal government has validly asserted criminal jurisdiction over lands held in trust for the Mississippi Choctaws. The remaining question, presented in *John* v. *Mississippi*, No. 77–575, is whether that jurisdiction is exclusive of state jurisdiction with respect to crimes involving Indians. We believe that it is.

We begin with certain established principles. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789. In *Worcester* v. *Georgia*, 6 Pet. 515, this Court made it clear that the lands of the Cherokee nation were territory "in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and [the Cherokee] nation is, by our constitution and laws, vested in the government of the United States" (*id.* at 560).

Although "the trend has been away from the idea of inherent tribal sovereignty as a bar to state juris-

diction and toward reliance on federal pre-emption" (*McClanahan* v. *Arizona State Tax Comm'n, supra,* 411 U.S. at 172), the effects on state jurisdiction have not changed significantly. The States may exercise criminal jurisdiction over crimes in Indian country not involving Indians (*United States* v. *McBratney,* 104 U.S. 621; *New York ex rel Ray* v. *Martin,* 326 U.S. 496); "[b]ut if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Williams* v. *Lee,* 358 U.S. 217, 220; *Williams* v. *United States,* 327 U.S. 711, 714 and n. 10; *McClanahan* v. *Arizona State Tax Comm'n, supra,* 411 U.S. at 171–172. Indeed, this Court has noted that "Congress has * * * acted consistently upon the assumption that the states have no power to regulate the affairs of Indians on a reservation." *Williams* v. *Lee, supra,* 358 U.S. at 220.

The assertion of federal jurisdiction over the Choctaw lands under 18 U.S.C. 1152–1153, therefore, would prevent the State of Mississippi from asserting concurrent jurisdiction over offenses on those lands involving Indians, unless the particular history and circumstances of the Mississippi Choctaws required a different result.[21] The Supreme Court of Mississippi

[21] To the extent that the assertion of federal jurisdiction rests on powers derived from the Property Clause, rather than Congress's plenary powers over Indian affairs, we reach the same conclusion. In choosing to manage its lands for the Choctaws' benefit, Congress has left little room for state interference through application of state criminal laws. As we discuss in the text, if the State can enter those lands at will and subject their occupants to arrest and imprisonment on state charges, such action will threaten the self-government of the Choctaws and conflict with the evident purpose of Congress in administering those lands. Thus, under the Supremacy Clause, state criminal jurisdiction must be held to be pre-empted. See p. 38, *supra.*

(J.S. App., p. 5a) appears to offer two coordinated rationales for upholding state jurisdiction over the Choctaw lands: (1) that Congress did not intend the federal courts to have jurisdiction over the Mississippi Choctaws, and (2) that in any event the state courts, once having had jurisdiction over the Choctaws, have not lost it. Our disagreement with the first proposition has already been discussed (pp. 14–31, *supra*); the second proposition merits further attention.

At first blush, there is some appeal to the notion that state courts, although historically disabled from claiming jurisdiction over Indians, may nonetheless retain any jurisdiction that they once acquired. In 1830 the federal government contemplated the general integration of the Mississippi Choctaws into non-Indian society, and state jurisdiction over the Choctaws presumably was accepted as a natural incident of that integration. But the Mississippi Choctaws did not become completely integrated with their non-Indian neighbors after the Treaty of Dancing Rabbit Creek; almost one hundred years later, this Court observed that the Choctaws had been "denied all social and political privileges." *Winton* v. *Amos, supra,* 255 U.S. at 379. It was precisely because the expected assimilation had failed, and the Indians had fallen into destitution, that the federal government

resumed its relations within the Mississippi Choctaws in the early part of this century.

Moreover, "[t]he overriding purpose of [the Indian Reorganization Act of 1934] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically" (*Morton* v. *Mancari*, 417 U.S. 535, 542). Pursuant to that Act, the Secretary of the Interior acquired additional lands for the Mississippi Choctaws, proclaimed all their trust lands to be a reservation, and approved a tribal constitution and by-laws (see pp. 21–23, *supra*). In these circumstances, assertion of state criminal jurisdiction over crimes involving Indians on the Choctaw lands would "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, *supra*, 358 U.S. at 220. If state jurisdiction over the Mississippi Choctaws on their own lands were authorized, the thrust of federal policy, with its objective of renewed tribal identity and self-determination, would be thwarted. State criminal jurisdiction must therefore be pre-empted.

This Court has reached a similar conclusion in *Fisher* v. *District Court*, 424 U.S. 382, a case concerning assertion of state jurisdiction over adoption proceedings involving members of the Cheyenne Tribe. Having concluded that the Tribal Court had exclusive jurisdiction over the proceedings (*id.* at 388), the Court rejected the State's argument that its

prior jurisdiction over tribal adoptions could not be displaced. The Court stated (*id.* at 390):

> The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe * * *, that jurisdiction has now been pre-empted.

There is no reason to reach a different result here. The federal government is not asserting jurisdiction over any lands owned by non-Indians but solely over lands held by the United States for the Choctaw Indians themselves. Compare *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584. When Indians go off those tribal lands, they are subject to state jurisdiction as they always have been. Moreover, the State has jurisdiction even within the tribal trust lands over offenses that do not involve Indians, *United States* v. *McBratney*, *supra*.[22] Should the State wish to exercise full criminal

[22] The Fourth Circuit has suggested in dictum that the State of North Carolina and United States have "concurrent" jurisdiction over lands held by the United States for the Eastern Band of Cherokee Indians. *United States* v. *Hornbuckle*, 422 F. 2d 391. To the extent that this language means only that the State may exercise jurisdiction where federal and tribal jurisdiction are not exclusive, we believe that the views in *Hornbuckle* may be reconciled with the position that we advance here. If the Fourth Circuit

jurisdiction over the Mississippi Choctaw lands, it may acquire such jurisdiction (with the Tribe's consent) under Title IV of the Civil Rights Act of 1968, 82 Stat. 78, 25 U.S.C. 1321 *et seq.* Thus, the State has ample means by which to assure its sovereign interests and the interests of its non-Indian citizens.[23]

We recognize that the federal government has not continuously asserted criminal jurisdiction over the Mississippi Choctaw lands since 1918 or even since 1945.[24] But the federal government should no more be disqualified by that omission from now affording protection to the Mississippi Choctaws, than it should be prevented from reestablishing a guardian-ward relationship with them because it once improvidently foresaw their integration into non-Indian society after the Treaty of Dancing Rabbit Creek. The symmetry between Indian history and Indian law is not always perfect. But where Congress, even belatedly, has sufficiently expressed its intent to exercise its plenary power over identifiable Indians, and to bring them within the ambit of federal concern, that intent should be given effect.

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means, however, that the State has jurisdiction over crimes committed by or against Indians on those lands, we believe that suggestion to be incorrect. In any event, we note that the history of the Eastern Band of Cherokees is in some respects quite different from the history of the Mississippi Choctaws. See *United States* v. *Wright*, 53 F. 2d 300 (C.A. 4).

[23] As a practical matter, it is our understanding that recognition of exclusive federal jurisdiction would affect few, if any, current state prisoners besides appellant.

[24] The federal government began asserting criminal jurisdiction over the Choctaw Reservation (when Indians were involved) during the late 1960s, and such jurisdiction has continued to the present time. The recent decisions of the Fifth Circuit and the Mississippi Supreme Court, however, have encouraged state authorities to exercise a greater degree of control over reservation activities and imperiled the effectiveness of federal law enforcement on Choctaw lands.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals and the Supreme Court of Mississippi should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
JAMES W. MOORMAN,
Assistant Attorney General.
H. BARTOW FARR III,
Assistant to the Solicitor General.
RAYMOND N. ZAGONE,
CARL STRASS,
LARRY G. GUTTERRIDGE,
Attorneys.

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